In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

UNITED STATES OF AMERICA, APPELLANT

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. 9–22) and its opinion on rehearing (App. 22–28) are reported at 238 F. Supp. 273.

JURISDICTION

The district court entered an order dismissing the indictment on December 18, 1964 (App. 22, 28). A petition for rehearing was filed on January 15, 1965. A minute entry denying vacation of the order of dismissal was entered on February 10, 1965 (App. 28), and an opinion reaffirming the dismissal was filed February 17, 1965 (App. 22–28). The notice of appeal

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was filed on March 9, 1965.[1] The jurisdiction of this Court to review on direct appeal the judgment of the district court, as one sustaining a motion in bar, is conferred by the Criminal Appeals Act, 62 Stat. 844, as amended, 18 U.S.C. 3731. *United States* v. *Healy*, 376 U.S. 75; *United States* v. *Mersky*, 361 U.S. 431.

QUESTION PRESENTED

Whether the government is estopped from bringing a criminal prosecution solely because, after previously investigating the defendant's activity, it had not instituted civil or criminal proceedings thereon.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing, before trial, an indictment charging the New Orleans Chapter, Associated

[1] The district court below has no rule fixing the time for seeking rehearing. Since the government's petition for rehearing was filed within the permissible time for appeal from the original judgment (*i.e.*, within 30 days of December 18, 1964), the time for appeal ran from the denial of rehearing on February 10, 1965. *United States* v. *Healy*, 376 U.S. 75, 77–80.

General Contractors of America, Inc. (the "Association"), and six individual members of the Association, with violating Section 1 of the Sherman Act. The indictment, filed on January 28, 1964, charged that since about 1958 the defendants had conspired to restrain trade by agreeing to "boycott and refuse to submit competitive bids on building construction projects for which the owner or architect intends to accept, or in fact accepts, separate bids from subcontractors." It was further charged that to effectuate this boycott the defendants agreed to adopt "Bidding Rule C," which formalized the scheme,[2] and to exert influence on owners, architects, general contractors and subcontractors in the New Orleans metropolitan area to abide by that rule (R. 4–12).[3]

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[2] "Bidding Rule C" is one of the Association's by-laws, and provides:

"C. Work To Be Included

"Competitive bids shall not be submitted on any project unless all of the items necessary to complete the job are included in the bid on the general contract. All items entering into the general contractor's bid are to be based upon prices, costs and estimates solicited or otherwise obtained directly by the general contractor from the subcontractors or vendors involved. This Rule is intended to prohibit members from submitting competitive bids in cases where the owner or architect takes bids direct from one or more classifications or subcontractors." [R. 7.]

[3] A civil complaint was filed on the same day naming the Association as the sole defendant and charging that since 1947 it had engaged in a continuing conspiracy to restrain trade. The complaint charged that in 1958 The American Institute of Architects, New Orleans Chapter, and the Construction Industry Association of New Orleans, Inc. (also named as co-conspirators in the indictment) joined the conspiracy, and that one of the terms of the conspiracy was that the Association and co-conspirators agreed to adopt and enforce Bidding Rule C (R. 121–131).

The defendants filed a motion to dismiss the indictment on the grounds, *inter alia,* that the grand jury which returned the indictment was not properly constituted or lawfully selected (R. 57–58). The district court rejected each of the arguments advanced in support of the motion but dismissed the indictment, *sua sponte,* on the ground that the government was estopped from bringing the prosecution (App. 22). The government had contended that the defendants' attack on the grand jury was untimely, and, in support of that contention, had introduced a letter from defendants' attorney in order to fix a date on which the defendants had known that they were being investigated by the grand jury. In the letter, which was addressed to the Assistant Attorney General in charge of the Antitrust Division, defense counsel argued that it would be more appropriate for the government to bring a civil, rather than a criminal, suit, particularly "since the Government made a thorough investigation of the Association ten or eleven years ago and made no complaint at that time about Bidding Rule C, which requires that all items necessary to complete the job be included in the general contract, which seems to be the primary objective of your present inquiry before the Grand Jury" (R. 136). The court ruled that since the government had offered the letter in evidence, it must be deemed to have vouched for the truth of all the statements in it (App. 20). On the basis of the sentence quoted above, the court held that the "government's acquiescence toward 'Bidding Rule C' following its earlier examination of the Association induced de-

fendants to continue using that same bidding procedure in the interim," and that public policy dictated that the government be estopped from bringing these criminal charges (App. 21–22). The government filed a petition for reconsideration and, after reargument, the court reaffirmed its order dismissing the indictment (App. 28).

THE QUESTION IS SUBSTANTIAL.

The case presents an important issue in the administration of criminal justice. The court below held that when the government conducts an investigation of suspected illegal activity and does not then seek an indictment or bring a civil suit, it thereby "acquiesces" in that activity and is barred from bringing a subsequent criminal prosecution against the same parties based on the same conduct or a continuation thereof. Under this decision, the failure to initiate criminal or civil proceedings after an investigation has the same effect as an acquittal after a criminal trial. Indeed, it has even greater effect, for it gives the party investigated an immunity from prosecution even for subsequent continuation of the conduct which was the subject of the investigation.

The ruling of the court below is wholly without support either in reason or precedent. There is ample authority that the doctrine of estoppel does not apply to suits brought by the United States in its sovereign capacity to vindicate the public interest,[4] and par-

[4] *United States* v. *City and County of San Francisco*, 310 U.S. 16; *United States* v. *California*, 332 U.S. 19; *Sanitary District of Chicago* v. *United States*, 266 U.S. 405; see, also, *American Surety Co. of New York* v. *United States*, 112 F. 2d

ticularly to criminal cases.[5] Congress alone may confer an immunity under a criminal statute. Even the fact that employees of the government may know of and acquiesce in an illegal course of conduct does not shield the violator from prosecution. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–227.

But even if that were not so, the doctrine of estoppel would have absolutely no application to a case such as this. Here the most rudimentary element of an estoppel is wholly absent. At no time did the government make any representation to the appellees, either express or implied, that it regarded their bidding rule as lawful. Still less did it give them any assurance that it would not invoke criminal sanctions against this arrangement in the future.[6] The fact that the government did not see fit to prosecute the appellees at the time of its earlier investigation did not imply approval of their activities, nor did it constitute an authorization to continue those activities.

There are many reasons why the government, after conducting an investigation, might decide not to seek an indictment. The prosecution may conclude, for example, that the evidence uncovered is inadequate to establish guilt beyond a reasonable doubt and that prosecution should therefore be deferred in the hope

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903 (C.A. 10); *United States* v. *Shubert*, 14 F.R.D. 471 (S.D.N.Y.).

[5] *McDonald* v. *United States*, 89 F. 2d 128 (C.A. 8), 31 C.J.S. § 140c, p. 695.

[6] Indeed, even the letter from the defendants' counsel which formed the basis of the district court's ruling, stated only that, although the government previously had made a thorough investigation of the Association, it "made no complaint at that time about Bidding Rule C * * *" (*supra*, p. 4).

that additional evidence will be forthcoming. Another possibility is that the violation, though clear, may not be serious enough to warrant then taking action in the face of other and more important competing demands on the government's limited personnel. In still other cases the legality of the conduct may be in doubt, and the prosecutor may not think it appropriate then to initiate a test case. For similar reasons, the government may think it desirable not to initiate civil proceedings. In view of these and other possible reasons for not taking action at the time of the investigation, there is obviously not the slightest basis for a rule which treats that inaction as tantamount to approval and as constituting a guarantee that the offending activity may be carried on with impunity in the future.

Similarly, there is no basis for the district court's suggestion that the government has been guilty of an "entrapment or * * * virtual entrapment" (R. 315). "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." *Sherman* v. *United States,* 356 U.S. 369, 372; *Sorrells* v. *United States,* 287 U.S. 435, 451. The court confused a situation where the government investigates a preexisting course of conduct but takes no action thereon with one where "the criminal design originates with the officials of the Government, and they implant * * * the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells, supra,* at 442; *Sherman, supra,* at 372. There is nothing in this record to indicate that the government either induced

the defendants to adopt any course of conduct or advised them that their prior conduct was legal.

The novel ruling of the district court, if followed, would severely hamper and distort the normal processes of criminal law enforcement. It would require prosecutors to seek indictments in doubtful cases lest their failure to do so later be held against them. It might also encourage prosecutors to postpone the investigation of suspected criminal activity in the fear that, although the evidence uncovered by an immediate probe might not be enough to secure a conviction, the investigation itself would close the door to any future prosecution based on the same course of conduct. Above all, this wholly unwarranted extension of the estoppel doctrine would give lawbreakers immunity for illegal activities which the government in no way encouraged or condoned and the prosecution of which could not result in any possible unfairness to them.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1965.

APPENDIX

United States District Court, Eastern District of Louisiana, New Orleans Division

Criminal Action # 29371 Div B

UNITED STATES OF AMERICA

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET ALS.

ELLIS, FRANK B., District Judge.

The New Orleans Chapter, Associated General Contractors of America, Inc., a trade association of general contractors operating in New Orleans, and six individuals associated with general contractor members of the Association were here indicted January 18, 1964, for alleged violations of the Sherman "Anti-trust" Act, 15 U.S.C.A. § 1. The gist of the charge is that defendants combined to advocate, use and implement a "single bid" system when competing for general contracting work in the New Orleans metropolitan area.

Pleas of not guilty were entered as to all defendants at arraignment February 19, 1964, and an additional 90 days were granted for the filing of special pleadings. In due course defendants moved to dismiss on two grounds, first, that the indictment does not state facts sufficient to constitute an offense against the United States, and, secondly, that the grand jury returning the indictment was not properly constituted or lawfully selected. This motion is now before the Court.

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I. Sufficiency of the Indictment

The general test to be applied in determining the sufficiency of an indictment is that set forth by the Supreme Court in *Russell* v. *United States,* 369 U.S. 749 (1962):

> "[F]irst, whether the indictment 'contains the elements of the offense intended to be charged', and 'sufficiently apprises the defendant of what he must be prepared to meet', and, secondly, 'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" (Citations omitted) 369 U.S. at 763–764. See also *United States* v. *Smith,* 228 F. Supp. 345, 346 (E.D. La. 1964); and *United States* v. *Vogt,* 230 F. Supp. 607, 609 (E.D. La. 1964).

The thrust of Defendants' argument here is that "the indictment fails to allege facts sufficient to establish an essential element of the offense charged, namely, a direct restraint or a direct and substantial adverse effect upon interstate commerce by the alleged combination and conspiracy."

While Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., requires a "plain, concise and definite written statement of the essential facts constituting the offense charged," it is also clearly established that evidence need not be pleaded in an indictment. See *Wilson* v. *United States,* 158 F. 2d 659, 663 (5 Cir. 1947), cert. den. 330 U.S. 850. The issue then is whether the indictment here sets forth sufficient "essential facts" regarding the effect of defendants' activities upon interstate commerce to enable defendants to prepare their defense and prevent double jeopardy.

It should be initially noted that in determining the sufficiency of an indictment charging a violation of

the Sherman Act the indictment must be considered as a whole. *United States* v. *New York Great Atlantic & Pacific Tea Co., Inc.*, 137 F. 2d 459, 464 (5 Cir. 1943), cert. den. 320 U.S. 783; *Local 36 of International Fishermen & Allied Workers of America* v. *United States*, 177 F. 2d 320, 326 (9 Cir. 1949), cert. den. 339 U.S. 947. The indictment in this case refers to two types of interstate impact alleged to have resulted from defendants' activities, one being the effect on out-of-state contractors who submit bids on Louisiana projects, and the other regarding construction materials supplied by non-Louisiana manufacturers and distributors for construction projects here.

Paragraph eight[1] of the indictment indicates that bid invitations on Louisiana construction projects are frequently sent to contractors "who are located in states other than Louisiana", that substantial numbers of those contractors bid on such projects, and that some of those contractors "have been members of the defendant Association." The principal types of construction materials used are listed in paragraph nine,[2]

[1] "8. Invitations to submit competitive bids on building construction projects in the New Orleans metropolitan area frequently include contractors who are located in states other than Louisiana. A substantial number of general contractors and subcontractors located in states other than Louisiana engage in the business of bidding on and contracting for building projects, and of performing their services, in the State of Louisiana and particularly in the New Orleans metropolitan area. Some of those general contractors who are located in states other than Louisiana have been members of the defendant Association."

[2] "9. The costs of building construction projects include, as a large portion thereof, the price for various building materials, equipment, and other products, including steel, stone, lumber, brick, tile, electrical controls, heating units, compressors and other special articles, which are contracted for, supplied, sold and installed by general contractors or subcontractors to whom

together with a reference to the general trade practice of only ordering materials "after award of a contract or in anticipation of a specified need." Paragraph ten [3] then adds that substantial quantities of such materials are shipped interstate directly to the job sites in Louisiana or to other places for subsequent delivery to those job sites.

The alleged unlawful combination and conspiracy is set forth in paragraph twelve [4] and charges that

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contracts have been awarded. Contractors, including members of the defendant Association, do not customarily carry in stock quantities of such materials, equipment, or other products, sufficient for large construction projects. They order them, after award of a contract or in anticipation of a specified need, from manufacturers or distributors."

[3] "10. Substantial quantities of such materials, equipment and other products which are furnished and installed by subcontractors and general contractors, including members of the defendant Association, are shipped in interstate commerce by manufacturers or distributors located outside the State of Louisiana directly to job sites in Louisiana. Other such materials, equipment and products are shipped by manufacturers or distributors located outside the State of Louisiana to contractors, dealers, or owners of construction projects for delivery to job sites in Louisiana. Thus, there is a substantial continuous flow of materials, equipment and products used by contractors in Louisiana, including members of the defendant Association, in interstate commerce from plants or warehouses located outside the State of Louisiana to locations within that State. Any restraints or interference with building construction projects in the New Orleans metropolitan area necessarily and directly restrains and affects the interstate flow of such materials, equipment, and products into the State of Louisiana."

[4] "12. The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants and co-conspirators, substantial terms of which have been and are:

"(a) That Bidding Rule C (set forth in paragraph 5(f) of this indictment) should be developed, adopted, promulgated and enforced by the Association;

defendants would boycott or refuse to submit competitive bids on building construction projects for which the owner or architect intended to accept, or in fact accepted, *separate bids* from individual sub-contractors. The Association's "Bidding Rule C"[5] advocates *single bids* for the entire project. Finally, paragraph fourteen[6] avers that defendants have thus obstructed free competition on building construction projects in the New Orleans metropolitan area and hence restrained interstate commerce.

"(b) That the defendants and co-conspirators, jointly and severally, should exert influence upon owners, architects, general contractors and subcontractors in the New Orleans metropolitan area to accept, support and abide by Bidding Rule C;

"(c) That members of the Association should boycott and refuse to submit competitive bids on building construction projects for which the owner or architect intends to accept, or in fact accepts, separate bids from subcontractors; and

"(d) That the Rules and Arbitration Committee for the Association should administer and police Bidding Rule C, for which purpose said Committee or its representatives should meet or correspond with owners, architects, general contractors and subcontractors in the New Orleans metropolitan area."

[5] "C. *Work to Be Included.* Competitive bids shall not be submitted on any project unless all of the items necessary to complete the job are included in the bid on the general contract. All items entering into the general contractor's bid are to be based upon prices, costs and estimates solicited or otherwise obtained directly by the general contractor from the subcontractors or vendors involved. This Rule is intended to prohibit members from submitting competitive bids in cases where the owner or architect takes bids direct from one or more classifications or subcontractors."

[6] "14. The aforesaid combination and conspiracy has had the following effects, among others:

"(a) General contractors and subcontractors have been restrained and prevented from freely competing for contracts on building construction projects in the New Orleans metropolitan area;

"(b) Public and private owners of building construction

In *United States* v. *South Florida Asphalt Co.*, 329 F. 2d 860 (5 Cir. 1964), cert. den. — U.S. — (33 U.S.L. Week 3139), several Florida "asphalt suppliers" regularly purchased, in Florida, an asphalt ingredient known as bitumen which had been imported mainly from South America. Defendants there challenged the sufficiency of the Sherman Act criminal charges against them alleging that their purchases of bitumen were not part of a "continued flow of commence" and hence had no direct effect on interstate commerce. In reversing the district court's dismissal of the bill of information, which incidentally bears a striking resemblance in both form and content to the indictment in this case, the Court of Appeals held that specifications in the charge as to particular acts alleged to bring about the substantial effect on interstate commerce were sufficient to preclude the granting of defendants' motion to dismiss the charges and at least permit the government an opportunity to prove its case.

> "In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the [foreign] producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such ship-

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projects in the New Orleans metropolitan area have been deprived of the benefits of free competition for contracts on such projects;

"(c) A private trade association has arbitrarily restricted owners, architects, general contractors and subcontractors in their freedom of doing business according to methods of their own choice;

"(d) Interstate trade and commerce in the contracting business and in building materials, equipment and special products has been restrained."

> ments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient." 329 F. 2d at 866.

The indictment here contains averments that orders for substantial quantities of construction materials were placed directly with out-of-state suppliers, and, in addition, that a "substantial number" of contractors located in states other than Louisiana bid on these projects.

The government stresses these fact allegations to establish the existence of transactions substantially affecting interstate commerce which could in turn be affected by any concerted attempt to control local bidding procedures. In that respect the averments parallel, at least in essential part, those in the *South Florida Asphalt* case and the government would here also be permitted to proceed. See *United States* v. *Employing Plasterers Assn.* 347 U.S. 186, 189 (1954); and *United States* v. *Employing Lathers Assn.*, 347 U.S. 198, 200 (1954). It is the opinion of this Court that the indictment taken as a whole sufficiently charges a violation of the Sherman Act, and the motion to dismiss on that ground is therefore denied.

II. Legality of the Grand Jury

Defendants have also moved to dismiss the indictment on grounds that the grand jury was not properly constituted or lawfully selected. In reply the government has moved to dismiss this motion, alleging that it was not timely filed.

The general rule for determining the timeliness of motions in criminal cases is set forth in Rule 12(b)(3)[1] and requires that the "motion shall be made before the plea is entered, but the court may permit

[1] Federal Rules of Criminal Procedure, 18 U.S.C.A.

it to be made within a reasonable time thereafter." The government's cross-motion could thus be disposed of summarily under the general rule by noting that at the time pleas were entered the Court granted an extension of time for the filing of motions and the motion was then filed within the time allowed.

The government contends further though that a special jurisprudential rule concerning timeliness has been enunciated by the Supreme Court when exception is taken to the competency of the grand jury. As stated in *Agnew* v. *United States,* 165 U.S. 36 (1897), that rule is:

> "that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late * * *" 165 U.S. at 44. See also *Cook* v. *United States,* 4 F. 2d 517, 518 (5 Cir. 1925); and *Michel* v. *Louisiana,* 350 U.S. 91, 100 (1955).

The refusal to dismiss the charge in *Agnew* was premised on a waiver theory, that is, that the failure to immediately object implied a waiver of his right to challenge the grand jury.

Recent developments in the law indicate that a more strict examination of waivers in criminal cases is now required. "The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege—'" was strongly reaffirmed in *Fay* v. *Noia,* 372 U.S. 391, 439 (1963), and applied to a post-trial habeas corpus petition challenging the legality of the grand jury in *Cobb* v. *Balkcom,* — F. 2d — (5 Cir. 1964) [No. 21085, 12/3/64, slip opinion p. 11]. The government here failed to prove that

defendants knowingly and intentionally waived their right to challenge the grand jury. Hence, defendants' motion will not be dismissed, especially since it was made at an early stage in the proceedings.

After a careful examination of the applicable statutes, the affidavits and exhibits of record, the testimony of the witnesses and the authorities cited by counsel, this Court is of the opinion that the Jury Commissioner, Mr. Roy M. Watson, and the Clerk of Court, Honorable A. Dallam O'Brien, Jr., substantially complied with all the requirements of 28 U.S.C.A. § 1864[8] in selecting the grand jury. Furthermore, "(i)n the absence of individual prejudice" to the defendants, which has not here been shown, there is no justification for dismissing the indictment. *Beatrice Foods Co.* v. *United States,* 312 F. 2d 29, 37 (8 Cir. 1963); cert. den. 373 U.S. 904; *Beck* v. *United States,* 298 F. 2d 622 (9 Cir. 1962) cert. den. 370 U.S. 919; *Romney* v. *United States,* 167 F. 2d 521 (D.C. Cir. 1948), cert. den. 334 U.S. 847. Thus, defendants' motion to dismiss the indictment on grounds that the grand jury was not properly constituted or lawfully selected must also be denied.

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[8] See 28 U.S.C.A. § 1864.

"§ 1864. Manner of drawing; jury commissioners and their compensation.

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive

III. Photographing and Fingerprinting

Shortly after the indictment was returned and the natural defendants appeared for preliminary hearing, they filed a "motion to be relieved from photographing and fingerprinting." Defendants pointed out first, that the charge against them under the Sherman Act is only a misdemeanor, not a felony, and secondly, that they are "life-long residents" of the community with "excellent reputations." This second point implies that photographing and fingerprinting would *per se* constitute punishment.

The general principles applicable to this question are set forth by Judges Learned Hand, Swan and Augustus Hand in *United States* v. *Kelly*, 55 F. 2d 67 (2 Cir. 1932):

> "Fingerprinting seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification." 55 F. 2d at 69.
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> "Such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that the gov-

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$5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia."

> ernment may be able to ascertain * * * whether the defendant has been previously convicted, are most important adjuncts of the enforcement of the criminal laws." 55 F. 2d at 68.

The basis for the decision there to permit fingerprinting was the right of law enforcement authorities to employ fingerprinting as an appropriate and useful means to identify criminals and detect crime.

The crime charged in the *Kelly* case was possession of a quart of gin during prohibition, a misdemeanor. Defendant argued "that many of the statutes and the decisions in common-law states have allowed finger printing only in case of felonies."

The Court there reasoned to the contrary:

> "(A)s a means of identification, it is just as useful and important where the offense is a misdemeanor, and we can see no basis for a differentiation." 55 F. 2d at 70.

Likewise, this Court perceives no basis for engrafting an exception to the general rule when a misdemeanor under the Sherman Act is charged.

Defendant's second contention that fingerprinting and photographing constitute punishment in itself was expressly negated in *United States* v. *Krapf*, 285 F. 2d 647 (3 Cir. 1961):

> "Initially it should be pointed out that fingerprinting is not a punishment. It is a means of identification which is useful in many circumstances some of which relate to the enforcement of our laws. Unless the burdens that this procedure places on the individual are unreasonable, therefore, it will be upheld as one of those annoyances that must be suffered for the common good." 285 F. 2d at 650–651.

Based on the foregoing reasons and analysis, defendants' motion to be relieved from photographing and fingerprinting was denied.

IV. Estoppel Against the Government

In challenging the timeliness of defendants' motion excepting to the legality of the grand jury, the government introduced a letter dated December 30, 1963, from defendants' counsel addressed to Mr. William H. Orrick, Jr., Asst. Attorney General, Antitrust Division, U.S. Dept. of Justice, and directed to the attention of Charles L. Beckler, Esq., Attorney, Dept. of Justice, purporting to show that defendants had knowledge of the pending grand jury investigations. This letter cuts two ways however and also raises the question of estoppel against the government.

In pertinent part Mr. Kerrigan's letter states:

> "I might add that it seems to us that the Government is being unnecessarily relentless in apparently seeking an indictment against many members of the New Orleans business community rather than exploring through frank discussion those policies of the Association to which your Department may have some objection.
>
> "Furthermore, if there should be any direct disagreement as to the propriety of any particular Association procedure, certainly such questions are better resolved in the customary antitrust injunction suit, which appears to be the standard method of testing matters of first impression. This seems to be particularly so since *the Government made a thorough investigation of the Association ten or eleven years ago and made no complaint at that time about Bidding Rule C,* which requires that all items necessary to complete the job be included in the general contract, which seems to be the primary objective of your present inquiry before the Grand Jury." [Emphasis added.]

The truth of statements therein is considered admitted since the government filed the letter into evidence.

The general rule is that the doctrine of estoppel is not applicable against the government in criminal matters. The rule admits, however, of an important exception.

> "The government is estopped in the enforcement of criminal laws only by some sound public policy, such as when its officers have induced or lured the defendant into the commission of a criminal act." *United States* v. *Farrell,* 87 F. 2d 957, 962 (8 Cir. 1937), cert. den. 302 U.S. 683; 31 C.J.S. 695, Estoppel § 140(c).

The facts here show that the government had in fact examined the activities of the Association, including the use of "Bidding Rule C", which is now the basis for the alleged criminal violations of the antitrust laws. The antitrust laws are unchanged; the relevant part of the Sherman Act has not since been amended. And there was never any effort by the Association to conceal from anyone its "modus operandi" with reference to bidding procedures. The provision for "single bidding" has been in the Association's rules of procedure for better than a decade and was fully known to the government.

Here the government's acquiescence toward "Bidding Rule C" following its earlier examination of the Association induced defendants to continue using that same bidding procedure in the interim. Any allegation that the activity formerly approved is now considered criminal cannot be countenanced. The Court cannot refrain from the observation that this attitude by governmental departments and their officials could impair confidence on the part of our citizens and taxpayers in their public institutions. Such an attitude could undermine proper respect for the government when encouragement of that respect, in accordance with the proper principles of law, is one of the

prime duties of the federal court. See *Kemp* v. *United States,* 38 F. Supp. 568, 571, (D.C. Md. 1941).

The promotion of our citizens' confidence in the motives and activities of our public servants is a strong public policy which here dictates that the government be estopped from prosecuting these criminal charges against this group of reputable contractors who at all times conducted their bidding procedures with integrity and with due regard for the laws of the United States.

Consequently, it is ordered that this indictment be, and the same is hereby Dismissed.

FRANK B. ELLIS,
United States District Judge.

MIAMI, FLORIDA, *December 16, 1964.*

United States District Court, Eastern District of Louisiana, New Orleans Division

Criminal Action No. 29371

UNITED STATES OF AMERICA

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ELLIS, FRANK B., District Judge.

On February 3, 1965, this Court entertained a motion by the Government for reconsideration of the Court's previous decision in this matter relating to estoppel against the Government. More specifically, the Court was requested to reconsider its application of the doctrine of estoppel against the United States which resulted in the dismissal of a criminal indictment issued under the Sherman Act against the New Orleans Chapter of Associated General Contractors and its individual members. The Court recognized

the general rule that estoppel is not applicable against the Government in criminal matters; however, given the particular facts and circumstances revealed during the preliminary proceedings of the case, an application of the exception to the general rule, as was stated in *U.S.* v. *Farrell*, 87 F. 2d 957, 962 (8th Cir. 1937), cert. den. 302 U.S. 683, was understood by this Court to be in accordance with an issue of sound, if not imperative, public policy involved in this particular case; namely, public confidence in the motives and conduct of public officials. The importance of the people's confidence in their institutions of government can never be reemphasized too strongly, especially in a nation where government has been dedicated and rededicated over the years to its people.

In its attempt to show that defendants had knowledge of pending Grand Jury investigations (and thereby successfully challenge the timeliness of defendant's motion excepting to the legality of the Grand Jury), the Government introduced a letter into evidence which it had received from defendants' counsel without entering any exception or reservation whatsoever as to the contents of the letter as a whole. The importance of this exhibit requires the Court at this time to quote verbatum from the Record at pages 18 through 21:

> Mr. BECKLER (Atty., U.S. Dept. of Justice): I am not through yet.
>
> And in response to the letter which I have just read, I received a reply dated December 30, 1963, from Deutsch, Kerrigan & Stiles, over the signature of R. Emmett Kerrigan.
>
> This letter is addressed as follows:
>
> "William H. Orrick, Jr., Esq., Assistant Attorney General, Anti-Trust Division, United States Department of Justice, Washington, D.C., 20530.

"Attention: Charles L. Beckler, Esq., Attorney, Department of Justice. Re: WHO:BJR:-CLB 60–12–112. Our File 8776.

"Dear Mr. Beckler: Thank you for your letter of December 24th and its invitation to members of the New Orleans Chapter, Associated General Contractors of America, Inc., to appear before the Grand Jury. I sent a copy of your letter to the Association and have discussed its contents with its Board of Directors.

"Since attorneys for the contractors could not be present during their examination, the Grand Jury might not get a full and complete picture of the general contracting industry in New Orleans.

"As you know, these are businessmen, not lawyers. Certainly, as an experienced attorney, you will acknowledge that the most forthright witnesses—men of undoubted integrity and candor—if untrained in the art of interrogation, can become bewildered and perhaps prejudice their situation when questioned at length by veteran prosecutors in the absence of a Judge or the assistance of their own counsel. For that reason I have advised the Association to decline your invitation.

"I might add that it seems to us that the Government is being unnecessarily relentless in apparently seeking an indictment against many members of the New Orleans business community rather than exploring through frank discussions those policies of the Association to which your department may have some objection.

"Furthermore, if there should be any direct disagreement as to the propriety of any particular association procedure, certainly such questions are better resolved in the customary anti-trust injunction suit, which appears to be the standard method of testing matters of first impression. *This seems to be particularly so since the Government made a thorough investi-*

gation of the Association ten or eleven years ago and made no complaint at that time about bidding Rule C, which requires that all items necessary to complete the job be included in the general contract, and which seems to be the primary objective of your present inquiry before the Grand Jury.

"The Association is willing to comply with any reasonable suggestion that would eliminate any misunderstanding about its bidding procedures. Please let me know whether you want to confer further about the matter before you reconvene the Grand Jury. I will be happy to meet with you there or in Washington.

"Respectfully, R. Emmett Kerrigan."

This is a photostatic copy, and we will supply defense counsel—

Mr. WELLER: I have attached a copy of it to my rebuttal memorandum.

Mr. BECKLER: *May we submit it as our Exhibit B, and I offer it in evidence.*

(Whereupon, the documents above referred to, marked for identification as Exhibit A and Exhibit B, were received in evidence.)

[Emphasis added]

The rules of evidence to be applied here are well-established in Louisiana jurisprudence as well as at common law. As far back as 1887, Chief Justice Bermudez of the Louisiana Supreme Court precisely summarized the applicable rule as follows:

> It is a general principle of the law of evidence, long recognized and so firmly settled as to be an axiom, that where either party litigant relies on the admissions or declarations of his adversary to make out a case against him, the whole of those admissions must be taken together as a unit, and that such party cannot select the favorable portions and repudiate the others. (citing cases) In keeping with that equitable rule of practice, the present court has declared that a party who introduces in evi-

> dence, *without qualification*, an instrument of writing, cannot be permitted to impeach or gainsay the correctness of its recitals. *Kolman* v. *His Creditors*, 39 La. Ann. 1089; 3 So. 382, 383 (S. Ct. La. 1887).

See also, *Lucas* v. *American Bankers' Ins. Co.*, 141 So. 394, 397 (La. App. 2nd Cir.) (1932); *Samuel Stamping & E. Co.* v. *Monroe Furniture Co., Ltd.*, 172 So. 217, 218 (La. App. 2d Cir.) (1937).

The rule as applied in common law jurisdictions is strikingly similar, and is stated by Corpus Juris Secundum in the following language:

> In the absence of an express understanding between counsel and the court that evidence is to be limited to a particular matter, the court will be authorized to consider evidence which has been admitted for any purpose for which it is competent and relevant to the issues. A party offering evidence which is competent only for a specific purpose must request the court so to limit the evidence * * * 88 C.J.S. 196, § 87.

See also, *Steele* v. *Wiedemann Machine Co.*, 280 F. 2d 380, 383 (C.A. 3) (1960).

Thus, the truth of the statements as quoted above from Mr. Kerrigan's letter and submitted into evidence, without qualification, by the Government was and remains considered by this Court as admitted by the Government, particularly the statement that

> "* * * the Government made a thorough investigation of the Association ten or eleven years ago and made no complaint at that time about Bidding Rule C, * * *" (Transcript of Proceedings at p. 20).

As was previously stated by this Court, the Government's acquiescence toward "Bidding Rule C" following its earlier and admittedly thorough exami-

nation of the Association certainly induced the defendants to continue using that same bidding procedure which the Association never attempted to conceal and of which the Government was fully aware for better than a decade.

Coupled then with established and well-recognized rules of evidence, the Court's invocation of public policy was thus considered proper in order to prohibit any allegation that the activity formerly investigated and unobjected to is now to be considered as criminal for purposes of retroactive prosecution. The concept of fairness permeates our laws, and that there remains confidence that it shall prevail is an interest to be understood as absolute.

In conclusion, the cases cited by the Government in its motion for reconsideration of judgment are readily distinguishable on the facts from the case at bar. In *United States* v. *Borden Co.,* 308 U.S. 188 (1939) as well as in *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150 (1940), a special statute or regulation suspending application of the anti-trust laws to a particular activity alerted defendants that their conduct would be considered unlawful unless formal approval were obtained from the official agency charged with the administration of a certain economic program. Therefore, the Court in those cases could well say that the illegal conspiracy continued and was subject to prosecution after termination of the license that had permitted the proscribed activity. As far as the quotation in Court of Justice Holmes' language in *Leach & Co.* v. *Peirson;* 275 U.S. 121, is concerned, the letter in question there was written by the plaintiff and offered into evidence by the plaintiff himself and was thus considered to be self-serving. That is quite different from the facts presented in the case at bar. Twigs should not be

confused with the trunks of great trees under which they may lie.

Consequently, for the reasons stated herein, the Court's previous decision in this case is hereby reaffirmed.

FRANK B. ELLIS,
United States District Judge.

NEW ORLEANS, LOUISIANA, *February 17, 1965.*

Minute Entry, February 10, 1965, Ellis, J.:

Division B, No. 29371, Criminal

UNITED STATES OF AMERICA

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL

This cause came on this day for hearing on motion of United States of America, for reconsideration of decision relating to estoppel against the Government and to vacate order of dismissal of the Indictment rendered December 18, 1964.

Present: Charles L. Beckler, Esq., Attorney for Department of Justice. Walter F. Gemeinhardt, Esq., Assistant U.S. Attorney. Francis G. Weller, Esq., Attorney for defendants.

Argument.

It is ordered that motion of United States of America; for reconsideration of decision relating to estoppel against the Government and to vacate order of dismissal of the Indictment rendered December 18, 1964 be, and the same is hereby, denied.

U.S. GOVERNMENT PRINTING OFFICE : 1966

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Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 119

UNITED STATES OF AMERICA,
Appellant

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. ET AL.,
Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

Motion To Dismiss Or Affirm

R. Emmett Kerrigan
1800 Hibernia Bank Building
New Orleans, Louisiana 70112

George W. Wise
815 Connecticut Ave.
Washington, D. C. 20006

Deutsch, Kerrigan & Stiles
Francis G. Weller

Hogan & Hartson
Joseph J. Smith, Jr.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

UNITED STATES OF AMERICA,
Appellant

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. ET AL.,
Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

---

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the grounds that the appeal is not within the jurisdiction of this Court, because the notice of appeal does not include a general statement of the offense, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment and order of the district court entered on December 21, 1964, and reaffirmed on February 17, 1965, after hearing on a motion for reconsideration. The judgment dismissed an

indictment charging appellees with violation of Title 15, United States Code, Section 1.

At the hearing on defendants' motion to dismiss the indictment, Government counsel, without any reservation or limitation, offered in evidence, and read into the record, a letter written by counsel for defendants to the Department of Justice prior to return of the indictment. This letter protested the proposed criminal proceedings because the very activities which the Government then was seeking to penalize criminally had been thoroughly investigated by the Government ten or eleven years before and the Government had made no complaint at that time about such activities.

The district court held that the Government's evidence established its long-time knowledge of, and acquiescence toward, the business practices of defendants charged as violation of the antitrust laws. Accordingly, the Court ruled that, under the circumstances of this case, the Government was estopped from subsequently criminally prosecuting that to which it had tacitly given its prior approval, and ordered that the indictment be dismissed. Upon reconsideration, the court concluded that, in the particular facts and circumstances of this case, considerations of public policy required dismissal of the indictment, and reaffirmed its previous decision.

The notice of appeal filed by the Government in the district court does not contain any statement concerning the offense.

ARGUMENT

1. Motion to Dismiss

The Rules of this Court provide that the notice of appeal in a criminal case shall include a general statement of the offense.[1] The notice of appeal filed in the present case is completely lacking in any statement whatsoever relating to the nature or identification of, or other reference to, the offense. Therefore, the appeal is not within the jurisdiction of this Court, because not taken in conformity to its rules.[2]

2. Motion to Affirm

The fundamental legal principle that the Government may be precluded from criminal prosecution by the acts of its officials, under appropriate circumstances, was recently reaffirmed by this Court in *Cox v. Louisiana,* 379 U.S. 559 (1965). Cited in support of its decision was *People v. Ferguson,* 134 Cal. App. 41, 24 P.2d 965 (1933),[3] which reversed a conviction for violation of the California corporate securities law where defendant had relied upon

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[1] "The notice of appeal shall be in three parts: (a) It shall specify the party taking the appeal; shall designate the judgment or part thereof appealed from giving its date and the time of its entry; shall specify the statute under which the appeal to this Court is taken; and, if in a criminal case, shall include a general statement of the offense. . ." Rule 10 2(a).

[2] "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules." Rule 16 1(a).

[3] Cox vs Louisiana, at 569, n. 3.

the advice of state officials that his conduct was permissible. Evidence to show this reliance was "neither immaterial nor irrelevant and should have been received"[4] declared the California court.

In the case at bar, evidence showing reliance by defendants on the knowledge and acquiescence of Government officials was offered by the Government itself. No attempt was made by the Government at that time or at the subsequent rehearing to modify, restrict or limit in any way the proof it offered and which, construed in its entirety by the district court, was found to establish knowledge and conduct by the Government estopping it from criminal prosecution of defendants.

The sole issue presented by this appeal is whether the district court erred in dismissing the indictment. This depends entirely upon the particular facts and circumstances involved in this individual case. Manifestly such questions are not substantial and do not present "an important issue in the administration of criminal justice," as asserted in the Government's Jurisdictional Statement.

Moreover, such assertions concerning the impact of the decision below on general criminal law enforcement ignore the distinction this Court made in *Cox* between true criminal activity and conduct which requires some interpretation to determine whether it is or is not of-

[4] People vs Ferguson, 24 P2d, at 970.

fensive.[5] Particularly applicable here are the observations in *People v. Ferguson* on the vagaries of law relating to modern commercial life.[6] In the case at bar, too, appellees were accused of violating a law *malum prohibitum,* one directed at one of the most complicated phases of modern commerce. This law was and is subject to varied interpretations, and the uncontradicted evidence shows that appellees relied upon the implied approval of officials charged with enforcing the statute. The district court correctly found from the Government's own evidence that the action of its officials, under the particular circumstances of this case, were tantamount to such approval, and that the Government was therefore estopped from prosecuting these defendants.

CONCLUSION

The foregoing establishes that this appeal should be dismissed for failure of the notice of appeal to comply

[5] "Nor does this limited administrative regulation of traffic which the Court has consistently recognized as necessary and permissible constitute a waiver of law which is beyond the power of the police. Obviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery." Cox vs Louisiana, supra at 569.

[6] "However, it occurs to us that a different situation is here presented. The regulation which has not been complied with is malum prohibitum and not malum in se. It covers one of the most complicated phases of modern commercial life. The statute can be read strictly or liberally, according to the type of mind applied to it. . . If the appellant early in his real estate career found himself in honest doubt, notwithstanding his high education and legal accomplishments, went to the fountain head itself for information. . .we cannot believe the law so inexorable as to require the brand of felon upon him for following the advice obtained. The mere statement of the facts demonstrate that such strict construction would be unconscionable and more calculated to engulf the innocent, law-abiding business man than to punish the guilty . . ." People vs Ferguson, 24 P2d, at 970.

with the Rules of this Court, or that this appeal should be affirmed because the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

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Deutsch, Kerrigan & Stiles
Francis G. Weller

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Joseph J. Smith, Jr.

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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 119

UNITED STATES OF AMERICA,
Appellant

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.,
Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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PETITION FOR REHEARING

R. Emmett Kerrigan
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SUPREME COURT OF THE UNITED STATES

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Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

---

PETITION FOR REHEARING

Appellees present their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

The Court, in its per curiam opinion reversing the District Court's dismissal of the indictment against appellees, cited only *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, at 623-624, and *United States v. Socony Vacuum Oil Co., Inc.*, 310 U.S. 150, at 226.

If these cases are cited as authority for the proposition that the government, under appropriate circumstances, cannot be precluded from criminal prosecution by the acts of its officials, then they are in clear conflict with the more recent decision of this Court in *Cox v. Louisiana*, 379 U.S. 559 (1965), cited and discussed in appellees' Motion to Dismiss or Affirm.

If *Cox* is distinguishable in principle from these two cases on the basis of the particular facts and circumstances involved, such a distinction buttresses appellees' Motion to Dismiss or Affirm in the present case.

In *Socony Vacuum*, the defendants claimed only to have the approval of spokesmen for an administrative agency. Here, the business practice alleged to be objectionable had the apparent sanction of the Department of Justice itself—that very arm of the Executive branch charged with enforcing the laws.[1]

Further, *Socony Vacuum* was a price fixing combination. This was illegal *per se*, said the Court, so the conduct of the defendants could not be evaluated in terms of purpose, aim or effect in the elimination of what was thought to be competitive evils.[2]

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[1] The incongruity of an enforcement agency seeking to penalize conduct to which it has given it approbation is emphasized by the Federal Trade Commission's dismissal of charges in *Arnold Constable Corp.*, 55 FTC 577 (1958), in which the accused had relied on the advice of a commission bureau chief:

> "The Commission being of the opinion that while the foregoing does not constitute a defense to any unlawful activity in which the respondent may have engaged, principles of equity and ordinary fair dealing do militate against the further prosecution of the complaint insofar as it charged the respondent with the use of fictitious pricing claims. . ."

[2] *United States v. Socony Vacuum Oil Co., Inc., supra*, at 228.

These *are* relevant considerations in the present case, in which the indictment was dismissed not because the Department of Justice acquiesced in a furtive *per se* violation of the anti-trust laws, but because the Department tacitly approved a business custom, i.e., the single contract bid system, which was defined, published and pursued for all of the world to see.

Likewise, in *Times-Picayune,* the Court noted only that a delay in prosecution invokes no prescriptive rights in favor of trade agreements.[3] But here is not merely a trade agreement between private businesses. In the instant case there is apparent sanction by that very arm of government which now seeks to penalize conduct it led defendants into believing was inoffensive.

Moreover, the Court in *Times-Picayune* noted that competitive business considerations are "not wholly irrelevant" in evaluating the conduct of persons charged with anti-trust violations. This distinction in measuring activity charged as offensive under the anti-trust laws, in contrast with offenses *malum in se* proscribed by the laws relating to crimes, was pointed out in *People v. Ferguson,* 134 Cal. App. 41, 24 P2d 965 (1933), cited by this Court in *Cox* and quoted in appellees' Motion to Dismiss or Affirm.[4]

CONCLUSION

The two cases cited by the Court in its reversal of the District Court's judgment are either in conflict with this

[3] *Times Picayune v. United States, supra,* at 623-624.
[4] Motion to Dismiss or Affirm, p. 5.

Court's current decision in *Cox*, or the principle upon which they can be distinguished from *Cox* supports appellees' Motion to Dismiss or Affirm. In any event the conflict requires clarification by the Court.

Respectfully submitted,

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CERTIFICATE

I, R. Emmett Kerrigan, counsel for the above named petitioners, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

New Orleans, Louisiana, this 1st day of Nov., 1965.

/s/
R. EMMETT KERRIGAN